Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

No. 81-5195

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AMICUS CURIAE, DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY, STATE OF NEW JERSEY

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OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE, DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY, STATE OF NEW JERSEY

INTEREST OF AMICUS CURIAE

This case presents questions concerning the procedural rights of individuals found not guilty by reason of insanity. Amicus curiae, the Division of Mental Health Advocacy of the New Jersey Department of the Public Advocate,[1]

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[1] The Division of Mental Health Advocacy, a State agency within the New Jersey Department of the Public Advocate, created by the New Jersey legislature in 1974, has two primary statutory functions: It "may provide . . . legal representation . . . for any indigent mental hospital admittee's admission to, retention in, or release from confinement in . . . [a mental hospital or a similar facility]," N.J.S.A. 52:27E-24, and it "may represent the interests of indigent mental hospital admittees in such disputes and litigation, as will . . . best advance [their] interests as a class on an issue of general application to them," N.J.S.A. 52:27E-25.

represents such individuals in nine of the state's 21 counties.[2] The Division has handled litigation in which various aspects of the issues present in the instant case have been addressed by the New Jersey courts.[3] In these cases, the Division has generally taken positions consistent with those advocated by petitioner in the instant matter. Because of its involvement and concern in these matters, the Division desires to inform the parties and this Court about New Jersey's experience with its system for assuring the rights of acquittees.

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[2]Division statistics indicate that Division attorneys have represented 54 acquittees at release hearings in the last six months.

[3]The Division of Mental Health Advocacy has also submitted, or moved for leave to file, briefs as amicus curiae in three other cases before this Court involving mental health issues within the experience and expertise of the Division and relevant to its work in New Jersey. Kremens v. Bartley, 431 U.S. 119 (1977),

Additionally, this case may resolve an apparent conflict between New Jersey Appellate Division decisions (In re Scelfo, 170 N.J. Super. 394, 406 A. 2d 973 (App. Div. 1979) and Matter of Newsome, 176 N.J. Super. 511 424 A. 2d 222 (App. Div. 1980)), and a recent revision of the New Jersey statutory scheme relative to acquittees (N.J.S.A. 2C:4-8), as to the burden of proof appropriately borne by the state in proceedings determining the committability of such acquittees.

Because of its statutory role and experience in these matters and because its concern about the possible effect of this case on New Jersey law in this area, the Division has sought leave from the parties to file its brief amicus curiae. Both parties to this case have consented and their consents are being filed herewith.

Parham v. J.R., 442 U.S. 584 (1979), and Mills v. Rogers, cert. grant. -- U.S. -- 101 S. Ct. 1972 (1981), motion to file brief amicus curiae out of time den, 50 U.S.L.W. 3546 (1982).

SUMMARY OF ARGUMENT

Amicus wishes to share with this Court and the parties a description of the development of New Jersey law relative to the procedures of incarceration and release of persons found not guilty by reason of insanity of criminal offenses, particularly as that development has been affected by opinions of the United States Supreme Court. Amicus, against the background of the New Jersey experience, asserts that due process requires that, except for an initial observation and examination period, an acquittee may not be committed or restricted except upon a finding of continuing mental illness and dangerousness. Further, amicus maintains equal protection requires that an acquittee should receive the same procedural protection afforded committees. As to burden of proof, it is

amicus' position that the prosecuting authority should bear the burden of proving the committability of the acquittee and that no "presumption of continuing insanity" should be used to shift this burden to the acquittee. Finally, the burden borne by the prosecuting authority should be one requiring proof by evidence that is at least clear and convincing.

ARGUMENT

I. DUE PROCESS REQUIRES THAT AN INDIVIDUAL FOUND NOT GUILTY BY REASON OF INSANITY NOT BE CONFINED TO A MENTAL HOSPITAL INDEFINITELY ON THE BASIS OF THAT FINDING ALONE.

A. New Jersey Has Evolved An Efficient And Constitutionally Adequate System For Disposition Of Cases Wherein There Has Been An Acquittal Of A Criminal Charge By Reason Of Insanity.

The present system of confinement and release of persons found not guilty by reason of insanity in New Jersey is found in

the New Jersey statutes[4] and Rules of Court.[5]

If a defendant is acquitted of a criminal offense by reason of insanity,[6]

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[4] N.J.S.A. 2C:4-8 and 2C:4-9 specifically deal with the disposition of persons found not guilty by reason of insanity. They are set forth in Appendix A, infra.

[5] N.J. Ct. R. 3:19-2, as effective September 1, 1979, reads as follows:

> If a defendant interposes the defense of insanity and the defendant is acquitted after trial on that ground, the verdict and judgment shall so state. Upon the return of a verdict of "Not Guilty By Reason on Insanity" or entering of judgment to that effect by a court sitting without a jury, the procedure for disposition of the defendant shall be as provided by N.J.S.A. 2C:4-8 and 2C:4-9 and R. 4:74-7.

R. 4:74-7 is the court rule concerning civil commitments. Relevant portions of the rule are set forth in Appendix B, infra.

[6] According to N.J.S.A. 2C:4-1:

> A person is not criminally responsible for conduct if at the time such conduct he was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. Insanity is an affirmative defense which must be proved by a preponderance of the evidence.

the court will order the defendant to undergo a psychiatric examination to aid in the determination of the appropriateness of confinement or restriction of the acquittee. If this examination is conducted while the acquittee remains institutionalized, it must, pursuant to the case of State v. Krol, 68 N.J. 236, 256, 344 A. 2d 289, 300 (1975) be completed within 60 days.[7] The acquittee may, pursuant to N.J.S.A. 2C:4-8a,[8] also be examined by a psychiatrist of his own choice.

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[7]In providing for the 60 day period of observation and examination, Krol noted:

> Proof by defendant that his criminal conduct was the result of mental illness provides sufficient justification for holding him in custody for a reasonable period of time to determine if he in fact should be indefinitely committed.

Id. See Benham v. Edwards, 501 F. Supp. 1050, 1059 (N.D. Ga. 1980), noting that a consensus of jurisdictions have accepted automatic observation periods but that two have rejected them (Indiana, Wisconsin).

[8]Text of statute in Appendix A.

A hearing is then conducted at which the state bears the burden of showing that the acquittee is mentally ill and poses a danger such that hospitalization or other suitable restraints are appropriate. The burden placed upon the state at this hearing is, by N.J.S.A. 2C:4-8b(3), one of preponderance.[9] The court shall thereupon enter an order providing for the appropriate level of restraint.

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9 See App. A for text of statute. It must be noted that this was also the burden established by the court in Krol, 68 N.J. at 257, 344 A. 2d at 300. However, both panels of the New Jersey Appellate Division which have considered the question have concluded, subsequent to this court's decision in Addington v. Texas, 441 U.S. 418 (1979), that a "clear and convincing" burden was constitutionally requisite for involuntary institutionalization of acquittees. Scelfo, 170 N.J. Super, at 397, 406 A. 2d at 975; Newsome, 176 N.J. Super. at 517, 424 A. 2d at 225. However, neither Scelfo nor Newsome dealt with hearings determining the initial appropriateness of commitment (N.J.S.A. 2C:4-8, infra App. A) outlined judically by Krol. Rather, these two decisions dealt with hearings held periodically for the review and alteration of the initial commitment (outlined principally by State v. Fields, 77 N.J. 282, 390 A. 2d 574 (1978); and see N.J. Ct. R. 4:74-7(f), App. B.) The degree of potential conflict will be discussed infra.

The periodicity of court review -- absent motion by a party -- is thereafter identical to that received by a civil committee as specified by N.J. Ct. R. 4:74-7.[10] This rule requires review "at intervals of three months, nine months and twenty-one months from the date of the judgment of commitment and at least annually thereafter, if necessary." Fields, 77 N.J. at 312, n. 11, 390 A. 2d at 589.

At each such periodic review the state continues to bear the burden of proof. Fields, 77 N.J. at 295, 390 A. 2d at 580. However, as indicated at n. 9, supra, the level of the burden to be met is open to some doubt at this time. N.J.S.A. 2C:4-8b(3),

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10 N.J.Ct. R. 3:19-2, n. 5 supra, contains specific reference to N. J. Ct. R. 4:74-7. Amendment of the rule in 1979 to include this reference was by way of conforming practice concerning acquittee review procedures to directives of the State Supreme Court in Fields. See Pressler, Current N.J. Court Rules, Comment to R. 3:19-2 (1972), at 438.

effective December 23, 1981, states that "during the maximum period of imprisonment that could have been imposed," had the acquittee been found guilty,[11] the continued commitment of the acquittee "shall be established by a preponderance of the evidence." This is consistent with the holdings of Krol, 68 N.J. at 257, 344 A. 2d at 300, and Fields, 77 N.J. at 299-300, 390 A. 2d at 583.[12]

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[11] See text of statute, App. A., explaining factors for calculation of "maximum period of imprisonment."

[12] In both cases the State Supreme Court noted there were other jurisdictions employing more stringent standards. Krol, 68 N.J. at 257, n. 9, 344 A. 2d at 299; Fields, 77 N.J. at 299, n. 6., 390 A. 2d at 586. In the latter footnote, the court commented:

> We note that the United States Supreme Court has recently agreed to review this issue in the civil commitment context. State v. Addington . . . Until the court speaks as to the requirements of the federal constitution in this regard, we perceive no constitutional infirmity in continuing to employ the preponderance standard in New Jersey.

However, this would appear to be in conflict with two holdings of the Appellate Division, n. 9 supra, which construed Addington in the context of the logic developed in Krol and Fields. These courts concluded that patients previously found not guilty by reason of insanity could only be continued in confinement at review hearings if the state met a burden of showing the necessity for continued confinement by clear and convincing evidence. Moreover, the Scelfo court determined that its holding was retroactive. 170 N.J. at 397, 406 A 2d at 975.

In addition to those hearings regularly scheduled for review of commitment, an acquittee may in the interim request judicial review of the current validity of the restrictions on his liberty. Fields, 77 N.J. at 304, 390 A. 2d at 584. The court need not grant the request absent "a prima facie showing that a material change in circumstances has

occurred since the last periodic review hearing." Id. However, unlike the situation at a regularly scheduled periodic review, in an acquittee-initiated review the acquittee himself bears the burden, by a preponderance of the evidence, that his request for modification or termination of restraints be granted.[13]

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[13]This conforms to habeas corpus practice in the District of Columbia. Respondent's brief at 5, n. 4. The Fields court supplemented its reasoning by remarking.

> We do not interpret the principles of due process to require the State to bear the burden of proof at every proceeding where the validity of the prevailing restraings upon the liberty of the committee is considered. As we have noted . . . the order entered after each periodic review validates the restraints imposed therein until the next such hearing. Hence, a committee-initiated review proceeding seeks modification of restraints whose current validity is presumptively established as a result of the adjudication at the most recent periodic review. We perceive no constitutional obstacle to requiring the party who seeks change in the presumptively valid status quo to bear the burden of demonstrating the necessity for such a change.

77 N.J. at 304, n. 9, 390 A. 2d at 585. It is

Additionally, N.J.S.A. 2C:4-9 provides that if "the commissioner [of Human Services], or his designee, or the Superintendent of the institution" to which a person has been committed pursuant to N.J.S.A. 2C:4-8, is "of the view"that this person may be discharged or released with conditions, he may so apply to the Court. The court may obtain additional psychiatric reports, if it desires, and may follow the recommendations it receives without a hearing, or, if not satisfied, order a hearing which

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appropriate to note here that in the District of Columbia, acquittees also bear the burden of proof at hearings they initiate. Respondents' brief at 3, n. 1. However, the difference between New Jersey and the District is that, unlike New Jersey, in the District there are no regularly scheduled reviews at which the prosecuting authority bears the burden. The District of Columbia panel did, however, mandate that the Superintendent of St. Elizabeth's or his subordinates should examine the patient every six months to determine potential eligibility for release. Jones v. U.S. A. 2d 183, 190 (App. D.C. 1978).

shall be conducted in the manner outlined in N.J.S.A. 2C:4-8. No statement is made in the statute as to who might bear the burden at such a hearing and, as of yet, there is no case law on the question.[14]

B. Considerations Of Equal Protection And Due Process Require That, After A Permissible Observation Period, An Acquittee Not Have His Liberty Restricted Absent A Judicial Finding Of Continuing Dangerousness As A Result Of Mental Illness.

The New Jersey Supreme Court has enunciated a clear doctrine of the substantial identity of acquittees and committees in terms of committability:

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14 Apparently there is similar confusion as to the placement of the burden in the District of Columbia's analogous statute. Respondent's brief at 3, n. 1. An ingenious solution to this problem has been devised in Colorado where the burden is borne by the party contesting the recommendation of the chief officer of the custodial institution. People v. Chavez, 629 P. 2d 1040 (Colo. Sup. Ct. 1981).

> A defendant who has avoided criminal sanction by establishing his insanity at the time he committed the offense for which he was tried stands on essentially the same legal footing, in terms of his amenability to involuntary commitment, as any other member of society . . . . Prospective NGI [not guilty by reason of insanity] committees and prospective civil committees are constitutionally indistinguishable in terms of their entitlement to procedural and substantive due process rights.[15]

Fields, 77 N.J. at 297, 390 A. 2d at 581.

It is clear that the court was making an effort to conform its logic to that previously developed by the Supreme Court of the United States. In Krol, after analyzing Baxstrom v. Herold, 383 U.S. 107 (1966) and Jackson v. Indiana, 406 U.S. 715 (1972), the New Jersey Supreme Court concluded:

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15 By way of footnote to the first sentence the Court noted the justifiable exception of an "automatic temporary commitment following an insanity acquittal for purpose of psychiatric evaluation of the acquittee's present mental condition." See analysis, at n. 9 supra.

> [T]he Supreme Court in these opinions has plainly attempted to enunciate a broad principle -- that the fact that the person to be committed has previously engaged in criminal acts is not a constitutionally accepted basis for imposing upon him a substantially different standard of procedure for involuntary commitment. The labels "criminal commitment" and "civil commitment" are of no constitutional significance.

68 N.J. at 251, 344 A. 2d at 297.

It must be immediately stated that in no way has the New Jersey Supreme Court suggested that the fact that the acquittee has committed a crime is to be ignored. Far to the contrary, the court has stated:

> It is appropriate for the [trial] court to give substantial weight to the nature and seriousness of the crime committed by defendant and its relationship to his present mental condition.

Krol, 68 N.J. at 261, 344 A. 2d at 302. Nor is the fact to be ignored at periodic reviews; the acquittee's "propensity, by reason of his mental illness, to engage in serious antisocial

conduct has on at least one occasion crystallized into the commission of what otherwise would constitute a criminal offense." Fields, 77 N.J. at 308, 390 A. 2d at 587.

The relevance of the prior anti-social conduct to present mental illness and dangerousness remains a question of fact:

> Empirical studies suggest that prior criminal conduct is an important factor -- perhaps the most important -- in the prediction of future dangerous conduct. (Citations omitted.)

Krol, 68 N.J. at 261, 344 A. 2d at 302.[16]

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16 For a recent analysis of the literature in support of this proposition, see Cocozza, Melick and Steadman, "Trends in Violent Crime Among Ex-Mental Patients," 16 Criminol. 317, 330 (1978). See also

Nevertheless, the Krol court made the following observations which certainly must inspire caution in any reliance that is placed upon the prior anti-social conduct:

> Even persons suffering from mental illness who have committed prior criminal acts have not been shown to be consistently substantially more dangerous than other persons suffering from mental illness . . . (Citations omitted.)

Krol, 68 N.J. at 247, 344 A. 2d at 295. A long term study of criminally insane patients

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Rabkin, "Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research," 86 Psychol. Bull. 1, 21 (1979), noting that "the best predictor of subsequent arrest for violent crime was arrest for one or more violent crimes preceding hospitalization." This is, of course, to be kept in the perspective that, "arrests for criminal acts are comparatively rare events . . . " Id. at 2. This latter point is prevalent in the literature. Steadman and Morrissey, "The Statistical Prediction Of Violent Behavior: Measuring the Costs of a Public Protectionist Versus A Civil Libertarian Model," Law & Human Behavior (in press) ("Clearly the most parsimonious manner to reduce the number of errors of either clinical or statistical predictions of dangerousness is to predict no one will be dangerous.") (manuscript, at 13).

released as a result of a federal court decision in Pennsylvania [Dixon v. Attorney General of the Commonwealth of Pennsylvania, 325 F.Supp. 966 (M.D. Pa. 1971)] concluded:

> In any population of the criminally insane, the proportion who would repetitively commit serious violent acts is quite small and the overall policy concerning the treatment of the criminally insane should not be based on the behavior of this small subgroup.

Thornberry and Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders 210 (1980) (emphasis added).

The Krol court summarized its reasoning, as applied in this regard to the first post-commitment hearing, by stating;

> The fact that defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of

> harm, either to himself or to others.

68 N.J. at 247, 344 A. 2d at 295.[17]

Having developed its reasoning as to the substantial identity of acquittees and committees, the court felt, when faced with the issue, that this must extend to the availability of automatic periodic judicial review. Such reviews were mandated by the court, "in response to O'Connor v. Donaldson [433 U.S. 563 (1975)]," by means of a civil practice

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[17] The "probable cause" for inquiry to which the court referred must not be mistaken for any kind of presumption of continuing insanity, an argument "whose soundness is doubtful at best . . . The decisive consideration where personal liberty is involved in that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned." Id. at 255, 344 A. 2d at 299.

rule.[18] Fields, 77 N.J. at 297, 390 A. 2d at 581. In requiring that the same procedures be made available to acquittees, the court stated simply:

> In light of the constitutional imperative of substantially equal treatment reflected in Baxstrom and Jackson, we discern no constitutionally satisfactory justification for denying comparable protection to NGI committees.

Id.[19]

It must be emphasized that the court has endeavored to advise the trial judges of New Jersey that "[t]he final decision on the need for an appropriate extent of restrictions on the committee's liberty is for the court, not the psychiatrists" (emphasis in original). Fields, 77 N.J. at 308, 390 A. 2d at 587.[20]

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[18] N.J. Ct. R. 4:74-7(f); see App. B. inf a.

[19] Accordingly, the court referred the matter to its Criminal Practice Committee which revised N.J. Ct. R. 3:19-2 to its present form, see n. 5 supra. See also, n. 10 supra, and App. B.

[20] The loyalties of state-employed psychiatrists may, in any case, be somewhat divided. Polk County v. Dodson, -- U.S. -- 102 S. Ct. 445, 450-451 (1981).

In indicating the caution that should be taken in these cases, the court remarked:

> [E]ven where the committee's condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the committee's liberty. For example, where the state is unable to justify the continuance of an order for restrictive confinement, the outright release of the committee into the community without the use of any intermediate levels of restraint . . . would normally constitute a manifestly mistaken exercise of the reviewing court's discretion.

Id. at 303, 390 A. 2d at 584.

On the basis of the foregoing, it can therefore be concluded that the New Jersey system of treating acquittees operates both efficiently and consistently in accordance with federal case law and current scientific thinking about the nature of this population.

II. CONSIDERATIONS OF EQUAL PROTECTION REQUIRE THAT A DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY SHOULD RECEIVE THE SAME PROCEDURAL PROTECTIONS AFFORDED CIVIL COMMITTEES.[21]

A. The Burden Of Proof For Establishing Continuing Dangerousness And Mental Illness Of An Acquittee Should Lie With The Prosecuting Authority.

In 1974, in the case of State v. Carter, 64 N.J. 382, 316 A. 2d 449 (1974), the New Jersey Supreme Court declared that an acquittee, at a hearing seeking discharge, bore the burden of proving his eligibility for conditional

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[21] Of the three differences between the statutory schemes of the District of Columbia for acquittees and committees -- jury trial, placement of proof burden and requisite quanta of proof -- amicus will only comment on the latter two. The jury trial issue could not arise in New Jersey, at least in any similar context, because "[c]ivil commitments under N.J.S.A. 30:4-23 et seq. are nonjury proceedings." Krol, 68 N.J. supra, at 264, n. 14, 344 A. 2d at 304.

release.[22] Only a year later, in the Krol case, the court reversed itself on this issue and declared that the state must establish the acquittee's committability by a preponderance of the evidence. Krol, 68 N.J. at 257, 344 A. 2d at 300. In Fields, the rationale was easily extended to periodic reviews, the court citing the "eloquently stated" reasoning of the Supreme Court of Connecticut.

> The burden should not be placed on the committed patient to justify his right to liberty. Freedom from involuntary confinement for those who have committed no crime is the natural state of individuals in this country. The burden must be placed on the state to prove the necessity of stripping the citizen of one of his most fundamental rights, and the risk of error

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[22] At the time, New Jersey law was to the effect that an acquittee must show his lack of dangerousness by clear and convincing evidence, thus justifying his release with conditions, but had to show his "restoration to reason" by only a preponderance in order to justify his final release. See discussion of this history in Krol, 68 N.J. at 263, n. 13, 344 A. 2d at 303-4.

> must rest on the state. Since the state has no greater right to confine a patient after the validity of the original commitment has expired than it does to commit him in the first place, the state must bear the burden of proving the necessity of recommitment, just as it bears the burden of proving the necessity for commitment. (Fasulo v. Arafeh, 173 Conn. 473, 378 A. 2d 553, 557 [1977]).

77 N.J. at 300, 390 A. 2d at 574.

The Connecticut court based its conclusions in part on a realistic consideration of the patient's environment:

> [T]o require a patient to initiate judicial review of his confinement and to bear the burden of proving the non-existence of the necessity for that confinement ignores the practical considerations . . . which are inherent in the mental patient's situation. Briefly, these include the difficulties of overcoming an isolated environment to initiate and coordinate a challenge to one's confinement. For instance, we cannot assume that friends and allies will always be available to secure counsel and marshal evidence on the patient's behalf.

Fasulo, 173 Conn. at 481, 378 A. 2d at 557. Additionally the Connecticut court noted that "practical difficulties" for the patient may include "his possible incompetence and the debilitating effects of drugs or other treatment." Id, at 482, 378 A. 2d at 557.

Obviously these considerations all add weight to the observation of the D.C. Circuit Court of Appeals in Waite v. Jacobs, 475 F. 2d 392, 395 (Ct. App. 1973):

> [E]specially in cases concerning psychiatric testimony which is "often unclear, sometimes woefully muddled," United States v. Leazer [citation omitted], the allocation of the burden of proof can be outcome determinative.

On the basis of this reasoning, amicus therefore submits that the burden of proof for continued restriction of acquittees should

lie with the prosecuting authority.[23]

B. Distinctions In The Procedural Guarantees Afforded Acquittees And Committees Cannot Be Justified On The Basis Of Any Scientifically Or Legally Supportable "Presumption Of Continuing Insanity."

Central to the argument that the acquittee should bear the burden in establishing his own lack of committability is a notion that, by successful assertion of an insanity defense, he has raised a "presumption of continuing insanity."

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23 An aspect of the case law from the District of Columbia which has received no recognition in New Jersey is the notion that an acquittee may bear "meaningful elements of responsibility." United States v. Brown, 478 F. 2d 606, 611 (D.C. Cir. 1973); Waite, 475 F. 2d at 396. It appears that the District's statutory scheme may have been developed in part as a result of the widened scope of the insanity defense resulting from case law in the district. Bolton v. Harris, 395 F. 2d, 642, 648-649 (D.C. Cir. 1968). It is submitted that any decision hinged on this idea could have no significance to a jurisdiction like New Jersey which retains a modified M'Naghten standard (n. 6 supra) and where the State Supreme Court has stated:

> In order to explain the basis of the presumption, courts have had trouble doing more than merely reiterating it, commenting on its "self-evident legitimacy."

Benham, 501 F. Supp. at 1068. This statement appears to be true of the instant case. In the en banc decision, the court stated that "it is reasonable to presume the continuation of mental illness . . . ," 432 A. 2d at 374, and:

> Commitment following acquittal by reason of insanity is not intended to be punitive, for, although such a verdict implies a finding that defendant has committed the actus reus, it also constitutes a finding that he did so without a criminal state of mind. There is, in effect, no crime to punish. (Citations omitted.)

Krol, at 246, 344 A. 2d at 295. Or, as a federal court in Georgia has recently pointed out:

> To punish an insanity-acquittee, or to utilize a procedure which includes a punitive component, runs counter to the overwhelming authority that an insanity-acquittee is not responsible, and not properly subject to punishment.

Benham, 501 F. Supp. at 1065, citing numerous authorities.

> As mentioned above, the presumption that a mental condition continues is a reasonable one and it is also reasonable to require the person who raised the presumption to refute it by affirmative proof.

Id. This view seems, in the District of Columbia, to go back to Waite, 475 F. 2d at 399-400, where it was stated, without supporting citation:

> The rational justification for placing the burden of proof on a committee is that his mental illness and dangerousness have previously been convincingly established. In light of these established facts, the law gives effect to a presumption of continunity of status. It comports with normal perception of reality -- and hence is rational -- to assume that, once a given status is proven to exist, it continues to do so in the absence of evidence showing the contrary to be more likely than not.[24]

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[24] Creation of a "presumption" application to the criminally insane but not the civilly insane certainly contradicts the general principle enunciated in Baxstrom:

> Classification of mentally ill persons as either insane or

In criticizing such a view, Judge Murphy in Benham noted that the Supreme Court has required that:

> [F]or a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548, 23 L. Ed. 2d 57 (1965) (emphasis supplied). Even if the presumption were "rational" -- which it is not -- it would not satisy this requirement of due process.

Benham, 501 F. Supp. at 1068, n. 24.[25]

> dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all.

Id. 383 U.S., supra, at 111 (emphasis in original).

[25]Essential adjudicatory facts may not be merely taken as presumed. Stanley v. Illinois, 405 U.S. 645, 657-8 (1972).

Judge Murphy then proceeded to show that "the literature emanating from the medical profession indicates that the presumption is not based on valid scientific evidence." Id.

In fact, it would appear that if any presumption were to accord with scientific evidence, it would be one expressing the opposite conclusion: that any given individual who has exhibited criminal dangerousness as a result of mental illness in the past will, more likely than not, exhibit no such dangerousness in the future. See citations in Benham, 501 F. Supp. at 1068.[26]

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[26] For more recent studies, see Thornberry and Jacoby, text at n.16, supra; Quinsey, "Release from a Maximum Security Psychiatric Institution: Demographic and Clinical Variables," 6 Crim. Just. & Behav. 390 (1979); Rabkin, n. 16, supra.

Furthermore, he may very well recover and cease to present any evident psychiatric symptomatology. Even schizophrenics, who as a class have a relatively poor prognosis, may be successfully treated if the condition is treated in one of its less serious stages. Arieti, Interpretation of Schizophrenia 646-7 (1974).

The Supreme Court has already recognized "the lack of certainty and the fallibility of psychiatric diagnosis," Addington, 441 U.S., at 429.

> Psychiatric diagnosis . . . is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient.

Id. at 430. Moreover, social and political pressure has been shown to affect psychiatric predictions. A Task Force Report of the

American Psychiatric Associated noted that "[p]sychiatrists, in order to be safe, too often predict dangerousness, especially in the case of mentally ill offenders." American Psychiatric Assocation, Clinical Aspects of the Violent Individual 25 (1974). See Thornberry and Jacoby, supra, at 192, finding that patients released from a hospital for the criminally insane pursuant to court order had considerably lower re-arrest rates than predicted by the hospital staff.[27]

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27 The study concluded:

> The Dixon patients were confined for an average of 14.1 years and, in New York State, the Baxstrom patients had been confined for an average of 14.7 years before they were transferred by court decisions . . . In both cases the empirical evidence suggests that confinement for this length of time is excessive and is not required for the benefit of either the patients or the community.

Inevitably, it is only appropriate to consider each individual separately.

> The decisive consideration where personal liberty is involved is that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a "class" to which he may be assigned.

Krol, 68 N.J. at 255, 344 A. 2d at 299. This is all the more true if, as appears to be the case, there is no class, from a scientific perspective, to begin with.[28]

Id. at 208. See also authorities cited at n. 16 supra, and Quinsey and Ambtman, "Variables Affecting Psychiatrists and Teachers' Assessments of the Dangerousness of Mentally Ill Offenders," 47 J. Consult. & Clin. Psychol. 353 (1979), concluding that forensic psychiatrists tended to make their assessments of patient dangerousness primarily on the basis of offense type. For a more recent analysis see Steadman, "The Right Not To Be A False Positive: Problems in the Application of the Dangerousness Standard," 52 Psych. Q. 84, 96 (1980): ("Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance.")

28 Some recent studies have suggested that certain factors may be more predictive of future dangerousness among psychiatric populations than others. One study found correlations of this sort connected with (1) the nature of

As Judge Murphy correctly observed in Benham, 501 F. Supp., at 1069, no presumption can arise as to acquittees because of the criminal behavior which

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the original offense (murder), (2) level of education and (3) diagnosis (retardation more likely connected with subsequent dangerousness). Quinsey, n. 26, supra. Another study concluded that:

> [P]atients with diagnosis of personality disorders, alcoholism, and drug dependency have disproportionate arrest rates. Whether this is caused by the nature of their disorders or by demographic characteristics associated with their distribution in the general population remains unclear.

Rabkin, 86 Psychol. Bull. at 23. See also, Grumberg, Klinger, and Grumet, "Homicide and Community-Based Psychiatry," 166 J. Nerv. and Ment. Disease 868, 873 (1978), noting especially:

> If mental illness is compared with the consumption of alcohol as a factor in the commission of homicide, we find that the use of alcohol is much more significant. Yet restrictions on the sale and consumption of alcohol are not considered popular ways to reduce crimes of violence.

initiated the legal processes against them. Many committees have in fact been committed rather than prosecuted because of police or prosecutorial discretion in disposition of cases.[29]

Judge Murphy was correct in concluding:

> In the light of the absence of any relevant difference between M.H.C. committees and insanity-acquittees, the tautological justification for the presumption in the latter's hearing lacks rational support.

It must also be considered that individuals violating the same social norms may be treated differently in different states depending on how much de-institutionalization and funding cut-backs have effected the closing of mental hospitals. See, Cocozza et al., supra, n. 17, and Monahan and Steadman, Crime and Mental Disorder: An Epidemiological Approach," Crime and Justice: An Annual Review of Research (Morris and Tonry, eds., in press).

[29]See Rabkin, 86 Psychol. Bull. at 6-7, for a literature summary. One study found that 71 of 100 randomly selected committees had engaged in illegal acts, including 23 likely felonies, none of which were prosecuted; also see Levine, "Criminal Behavior and Mental

Id. Therefore, amicus would urge this Court to decide this case without relying on a "scientifically unsupported" presumption of continuing insanity.

C. The Prosecuting Authority Should Bear The Burden Of Proving The Committability Of An Acquittee By Clear And Convincing Evidence.

Amicus supports petitioner's contention that committability of an acquittee should be proven by clear and convincing evidence. As indicated above, two New Jersey appellate decisions have acknowledged the Addington logic as applicable to acquittees. Perhaps the logic for such an application of Addington

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Institutionalization," J. Clin. Psychol. 1134 (1977).

Concommitantly, there is now evidence that a significant number of minor crimes may be committed by individuals as a way of asking for help. Lamb and Grant, "The Mentally Ill In An Urban County Jail," 39 Arch. Gen. Psych. 17, 19 (1982).

was best developed in Judge Wright's dissent in the pre-Addington case of United States v. Brown, 478 F. 2d 606, 613-614 (D.C. Cir. 1973), where he observed:

> Bolton and Baxstrom stand for a basic proposition that a proven history of past dangerousness or illness, while certainly admissable in evidence, may not be used as an excuse to abrogate or change well recognized safeguards including burden of proof, in civil commitment proceedings, or their equivalent, to determine present dangerousness or illness . . . . [A]cquittal by reason of insanity says precious little on the question whether a person presently suffers from mental illness. At most, an insanity acquittal means that at the time the charged crime was committed, which ordinarily would be months or sometimes years before the Section 301(d) hearing, there was a reasonable doubt that the defendant was free of such an illness. Such a reasonable doubt as to sanity is hardly tantamount to a conclusion of mental illness, there may well be only the flimsiest relation between the Government's failure to prove past capacity and current incapacity [footnote omitted]. Thus, it can hardly be argued that the prior acquittal, standing

> alone, has any necessary bearing as a factual matter on the mental illness finding to be made in the Section 301(d) hearing.

Amicus contends that no distinction between acquittees and committees can appropriately be made by the procedural mechanisms being considered here, but that rather the distinction can be more effectively made by substantive consideration of the evidence of the acquittees prior conduct. See Point II. B., supra. Therefore, amicus believes the Court should extend the clear and convincing standard as to the commitment of acquittees.

CONCLUSION

For the reasons stated above, amicus urges the Court to reverse the

judgment of the Court of Appeals of the District of Columbia.

Respectfully submitted,

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APPENDIX A

N.J.S.A. 2C:4-8. Commitment of a person by Reason of Insanity.

a. After acquittal by reason of insanity, the court shall order that the defendant undergo a psychiatric examination by a psychiatrist of the prosecutor's choice. If the examination cannot take place because of the unwillingness of the defendant to participate, the court shall proceed as in Section 2C:4-5c [allowing the court "to permit examination without cooperation . . . appoint a different psychiatrist or . . . commit the defendant for observation for a period not exceeding 30 days except on good cause shown, or exclude or limit testimony by the defense psychiatrst"]. The defendant, pursuant to this section, may also be examined by a psychiatrist of his own choice.

b. The court shall dispose of the defendant in the following manner: (1) If the court finds that the defendant may be released without danger to the communtiy or himself without supervision, the court shall so release the defendant; or (2) If the court finds that the defendant may be release without danger to the community or himself under conditions, the court shall so order; (3) If the court finds that the defendant cannot be released with or without supervision or conditions without posing a danger to the community or to himself, it shall commit the defendant to a mental health facility approved for this purpose by the Commissioner of Human Services to be treated as a person civilly committed. In all

proceedings conducted pursuant to this section, including any periodic review proceeding, the prosecuting attorney shall have the right to appear and be heard. The defendant's continued commitment, under the law governing civil commitment, shall be established by a preponderance of the evidence, during the maximum period of imprisonment that could have been imposed, as an ordinary term of imprisonment, for any charge on which the defendant has been acquitted by reason of insanity. Expiration of that maximum period of imprisonment shall be calculated by crediting the defendant with any time spent in confinement for the charge or charges on which the defendant has been acquitted by reason of insanity.

c. No person committed under this section shall be confined within any penal or correctional institution or any part thereof.

2C:4-9 Release of Persons Committed by Reason of Insanity

a. If a person has been committed pursuant to this chapter and if the commissioner, or his designee, or the superindentent of the institution to which the person has been committed, is of the view that a person committed to his custody, pursuant to Section 2C:4-8, may be discharged or released on condition without danger to himself or to others, or that he may be transfered to a less restrictive setting for treatment, the commissioner or superintendent shall make application for the discharge or release of such person in a report to the court by which such

person was committed and shall transmit a copy of such application and report to the prosecutor, the court, and defense counsel. The court may, in its discretion, appoint at least two qualified psychiatrists, neither of whom may be on the staff of the hospital to which the defendant had been committed, to examine such person and to report within 30 days, or such longer period as the court determines for the purpose, their opinion as to his mental condition.

b. If the court is satisfied by the report filed pursuant to subsection a. of this section and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged, released on condition without danger to himself or others, or treated as in civil commit-

ment the court shall order his discharge, his release on such conditions as the court determines to be necessary or his transfer. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged, released or transferred. Any such hearing shall be deemed a civil proceeding. According to the determination of the court upon the hearing, the court shall proceed as in section 2C:4-8b (1) (2) or (3).

c. A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the commissioner.

d. Each defendant's case shall be specifically reviewed as provided by the law governing civil commitment.

APPENDIX B

R. 4:74-7 Civil Commitment[1]

...

(d) Discovery . . .

The court may order testing or examination of the patient by an independent psychiatrist, psychologist or educational expert. The cost of any such examination and the expert's fee for testifying, if any, shall be

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1 R:4-74-7 governs court practice as to civil commitments in New Jersey. Necessarily, much of the procedure is irrelevant as to acquittees -- commencement of a civil action, temporary commitment -- or sufficiently tangential to this argument -- legal settlement, filing procedures -- that it has been thought best to present an abridgment here. Certain aspects of those procedures which are unique to minors have been deleted also.

borne by the person or public body charged with the patient's legal settlement.

(e) Hearing

No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral testimony of at least one psychiatrist licensed in any one of the United States who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient

would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se.

(f) Final Judgment Of Commitment, Review. The court shall enter a judgment of commitment to an appropriate institution if it finds the evidence presented at the hearing that the institutionalization of the patient is required by reason of his being a danger to himself or others or property if he is not so confined and treated . . . . If the patient is an adult, the judgment shall provide for review of the commitment no later than (1) three months from the date of judgment, and (2) on or before

six months from the date of the first review hearing, and (3) on or before one year from the date of the second review hearing, and (4) at least annually thereafter, if the patient is not sooner dishcarged . . . . All reviews shall be conducted in the manner required by paragraph (e) of this rule except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration or two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no less than three months

prior thereto. The court may, in its discretion, at a review hearing, where the advanced age of the mental patient or where it would be impractical to obtain the testimony of a psychiatrist (as defined in paragraph (e)), support its findings by the oral testimony of a physician licensed in any one of the United States. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) Judgment of Release.

A Judgment discharging the patient may contain in appropriate circumstances conditions for the release such as attendance at a non-residential mental health facility or other form of supervision. Any such conditions shall be stated in the order of discharge with particularity. The continuation of any

such conditions shall be subject to periodic review as provided by paragraph (f) hereof.